

B6
comprises cocoa butter, cocoa butter equivalent, cocoa butter replacer, crystallizable vegetable fat, and mixtures thereof; the cereal-based component is selected from the group consisting of corn, oats, wheat, barley, rye, rice, millet malt and mixtures thereof; and the sugar is selected from the group consisting of glucose, lactose, fructose, sucrose, maltose, dextrose, polydextrose, maltodextrin, inverted sugar, a product of the enzymatic saccharification of starch and mixtures thereof.

REMARKS

Applicants appreciate the courtesies extended by Examiner L. Tran during an interview on May 15, 2002 with Applicants' attorney, Jeffrey A. Wolfson. The comments appearing herein are substantially in accord with those presented and discussed during the interview, along with a few additional amendments and remarks made herein.

Claims 1-14 and 29-40, as amended, are pending for the Examiner's review and consideration. Claim 1 has been amended to recite features previously in claims 2 and 7, that the vegetable solids are finely ground to a size of about 80 microns or less, as well as specific classes and amounts of fat (*See, e.g.*, Claim 7 and Specification at ¶ 30). Claim 39 has been similarly amended to recite specific classes of fat, *i.e.*, cocoa butter or derivatives thereof, vegetable fat, or a combination thereof. Claim 2 has been amended to recite a preferred embodiment where the fat is present in an amount of at least about 30 weight percent (*See, e.g.*, Claim 39 and Specification at ¶ 30, lines 1-3). Claim 7 has been amended to recite that the product uses vegetable solids to replace a portion of the cocoa solids, sugar solids, or milk solids (*See, e.g.*, Specification at ¶ 11, lines 8-13). Claim 9 has been amended to fix a typographical error in the preamble. Claims 10 and 40 have been amended to recite "comprises" instead of Markush language (*See, e.g.*, Specification at ¶ 30, lines 4-8). Claim 13 has been amended to further recite that the non-cereal vegetable solids comprise a combination of vegetables (*See, e.g.*, Specification at ¶ 23, line 7). Claim 34 has been amended to clarify the "further shaped component" as being the second one. Claim 40 has also been amended to correct a typographical error in the word "maltodextrin" (*See, e.g.*, Specification at ¶ 37, line 6). Accordingly, as no new matter has been added and no new issues raised by these amendments by virtue of their previous pendency, entry of the claims and the amendment as a whole is warranted at this time.

Before addressing the claim rejections, Applicants believe that a brief summary would be helpful to highlight the important features of the present invention that are distinguished from the prior art.

The present invention is directed to a confectionery product that has a vegetable solid content to provide nutritional content and includes fats including cocoa butter or derivatives thereof, vegetable fat, or a combination thereof, in amounts of at least 25 percent by weight to provide a confectionery texture. The confectionery of the present claims promotes vegetable consumption, especially for those who do not like the taste of vegetables. Thus, the advantages of the present invention is that it is a vehicle for vegetable consumption, while offering a pleasant taste and confectionery texture much like chocolate or other confectionery products.

Claims 1, 32, 34, and 39 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for the reasons on page 2 of the Office Action. "Confectionery texture" is alleged to be indefinite in claims 1 and 39. This term is well known to those of ordinary skill in the art, and, for example, distinguishes the texture of the claimed product from that of a vegetable (*See, e.g.*, Specification at ¶ 11, lines 5-8). For example, a confectionery texture includes that of chocolate and chocolate substitutes. Claim 39 even explicitly recites a feature of the confectionery texture, *i.e.*, that the product provides a melt-in-the-mouth sensation.

Claim 32 recites "the shaped mixture," which refers to the language in claim 1 where the fat matrix and vegetable solids, which are present in a mixture, form a stable shape. Thus, the language of claim 32 is believed to be completely clear to those of ordinary skill in the art. Claim 34 is alleged to be indefinite since the "further shaped component" does not specify first or second. Claim 34 has been amended to clarify that it is the second further shaped component is being referred to, as the first further shaped component is already recited to be positioned in claim 32. Therefore, it is believed that the rejection of claims 1, 32, 34, and 39 under 35 U.S.C. § 112, second paragraph, has been overcome and should be reconsidered and withdrawn.

Claims 1 and 4-6 were rejected under 35 U.S.C. § 102(a) as being anticipated by DE 2746479 to Bayer AG ("Bayer") for the reasons on page 2 of the Office Action. Applicants respectfully traverse for the reasons below.

Bayer discloses a confectionery with an adulterant consisting of dried beet, bran and Soya flour. Bayer does disclose that 5-70 percent of dried fiber can be used. The following examples are disclosed in the cited reference: Example 1 recites: 13% cocoa, 21% cocoa butter, 2% Soya flour, 20% whole milk powder, 29% sugar and 15% bran; Example 2 recites: 13% cocoa, 21% cocoa butter, 2% Soya flour, 20% whole milk powder, 29% sugar

and 15% beet; Example 3 recites: 26% hazelnut, 14% cocoa butter, 33% sugar, 13% whole milk powder, 4% Soya flour, and 10% beet.

Bayer does not anticipate the present claims, since it does not teach a fat component in the continuous phase or vegetable solids dispersed in such continuous phase, as presently recited. This helps provide the claimed confectionery product with the recited confectionery texture, as well as the melt-in-the-mouth sensation that is also presently recited in claim 39. Additionally, Bayer fails to disclose or even suggest the claimed particle size of about 80 microns or less, as well as failing to teach the inclusion of fat comprising cocoa butter or derivatives thereof, vegetable fat, or a combination thereof, in an amount greater than 25 weight percent, as presently recited. Bayer is short on specific details, and at best teaches 14 weight percent and 21 weight percent cocoa butter (Exs. 1-3). Although other small amounts of fat may be present in the cocoa mass or the whole milk, for example, Bayer does not teach that the total fat amount can be over 25 weight percent. Moreover, Bayer clearly fails to teach more than 25 weight percent of a fat component that includes cocoa butter or derivatives thereof, vegetable fat, or combinations thereof, as presently recited. For each of these reasons, Bayer does not anticipate any of the present claims, since it fails to teach each and every feature presently recited. Accordingly, the rejection of claims 1 and 4-6 under 35 U.S.C. § 102(a) by Bayer should be reconsidered and withdrawn.

Claims 2-3, 7-14, and 29-40 were rejected under 35 U.S.C. § 103(a) as being obvious in view of Bayer for the reasons set forth on pages 3-4 of the Office Action.

Applicants traverse this rejection.

Bayer is directed to a confectionery that includes an adulterant to improve digestion and reduce the sensation of hunger, *i.e.*, to *discourage eating*. It does not teach or suggest a confectionery product that provides a pleasurable, tasty, vehicle for vegetable consumption, designed especially to encourage children and others who do not like the taste of vegetables to increase their intake of such food. Thus, as a whole, Bayer is teaching a product that inhibits eating, while the present invention recites a confectionery product that is designed to enhance and increase consumption of vegetables. This is the essence of a reference *teaching away* from a claimed invention. A copy of an English-language translation of Bayer is submitted herewith for the Examiner's convenience.

As noted above, Bayer teaches only 14 weight percent and 21 weight percent cocoa butter (Exs. 1-3). Although other small amounts of fat may be present in the cocoa mass or the whole milk, for example, Bayer does not teach that the total fat amount can be at least 25 weight percent as presently recited. Moreover, the present invention recites

fat comprising cocoa butter or derivatives thereof, vegetable fat, or combinations thereof. Thus, the possible additional fat inherently present in other components of Bayer, like the milk and cocoa, is irrelevant to the presently recited invention, which now recites at least 25 weight percent of a fat comprising cocoa butter or derivatives thereof, vegetable fat, or combinations thereof. Bayer fails to teach greater than 21 weight percent cocoa butter, and in fact it motivates those of ordinary skill in the art to use smaller amounts of fat based on Example 3 and based on the intended use of its composition.

Also, Bayer does not teach a product containing relatively large amounts of non-cereal vegetable ground to a size of about 80 microns or less and dispersed in the continuous fat phase while providing a smooth confectionery texture with melt-in-the-mouth sensation, as presently recited. Therefore, not only is the purpose of Bayer completely different from that of the present confectionery product, but the teachings therein do not even suggest a confectionery with large amounts of specific types of fat.

Furthermore, Bayer *teaches away* from the present invention in several ways. Example 1 discloses a confectionery with no vegetable component. Clearly, such disclosure suggests that vegetable component is only optional, since Bayer is not even concerned with increasing vegetable content or consumption in its product. Bayer cannot possibly suggest the surprising and unexpected benefits of the present invention, *i.e.*, increasing vegetable consumption. Moreover, Bayer is directed to reducing hunger pangs to inhibit food intake, which *teaches away* from including large amounts of fat content that would not be desired in such a formulation. The present invention, however, recites greater than 25% by weight of certain types of fat in addition to the nutritious vegetable solids.

Although Bayer does disclose that beet cossettes can be finely ground, it fails to teach grinding particles to a size of about 80 microns or less--much less the surprising and unexpected benefits of doing so--as presently recited presently recited. Bayer specifically states that particle size can be modified in any way so as to affect the *chewiness*. The present invention, however, obtains a smooth, melt-in-mouth sensation and mouthfeel as a result of the finely ground vegetable particles being properly *dispersed* in the fat matrix, which are not taught by Bayer. There is no teaching in Bayer that the specific size recited, *e.g.*, a magnitude of order smaller, helps obtain the textural advantages of the present invention. The previous Office Action alleges that it would be obvious to optimize particle size for taste, however, that is not the primary reason the recited particle size is so surprisingly and unexpectedly important, as noted herein. No suggestion existed in the art of record to modify

particle size primarily for texture characteristics in combination with the other recited features.

Furthermore, several dependent claims have additional features that distinguish the present invention from the cited art even more clearly. Claim 2 recites at least about 30 weight percent fat, which is almost 50% more fat from cocoa butter, derivatives, vegetable fat, or a combination thereof than the maximum taught by Bayer. Claim 7 recites that the product is formed from modified chocolate, wherein at least a portion of the cocoa solids, sugar solids, or milk solids, or a combination thereof, has been removed and replaced with vegetable solids. Bayer *teaches away* from this substitution by expressly disclosing that chocolate should be mixed in molds or slabs with dietary fiber to form the Bayer invention. Even Example 3 of Bayer fails to teach such a replacement based on chocolate, as it simply discloses combining cocoa butter with dietary fiber and a few other ingredients. The mere presence of cocoa butter without disclosure of cocoa mass does not suggest the feature recited in claim 7. Claim 13 recites a combination of vegetables in the solids, which can provide unique mixtures of vegetable material in a desirable, edible form. Bayer fails to teach the features of claim 13, as it discloses beets as a dietary fiber and fails to suggest any other vegetables at all, much less the inclusion of a combination thereof.

In sum, Bayer does not disclose or suggest a confectionery product with a fat content above 25 weight percent, particularly a fat comprising cocoa butter or a derivative thereof, a vegetable fat, or a combination thereof, so as to impart a confectionery texture to the product. Bayer also does not teach grinding vegetable solids to a size of about 80 microns or less for texture purposes. Accordingly, Bayer has different components and a different form from those recited in the present invention, in addition to teaching away from the recited invention. Thus, the rejection of claims 2-3, 7-14, and 29-40 under 35 U.S.C. § 103(a) has been overcome and should be reconsidered and withdrawn since no *prima facie* case of obviousness has been shown.

Claims 1-14 were rejected under 35 U.S.C. § 103(a) as being obvious over DE 4224356 to Gangkofner ("Gangkofner") for the reasons set forth on pages 4-6 of the Office Action. Applicants traverse this rejection.

The Office Action concedes that the critical features of the instant claims 1-14 are not disclosed by Gangkofner (page 4), including the size of vegetable solids, amount of fat, and the amount of vegetable. Instead, the Office Action simply reiterates the same mantra as for Bayer as to the obviousness of modifying each and every one of these important features to obtain the present invention. This is clearly the essence of a hindsight rejection,

since no pretense is even made to refer to Gangkofner for any specific teachings or motivation to so drastically modify the reference. Applicants are not claiming a method of "giving vegetable consumption when the product is consumed," which seems to be alleged on page 6 of the Office Action, but are claiming a confectionery product with specific features that are not even suggested by Gangkofner.

Gangkofner generally discloses a food product that has hot or warm chocolate used as a binder for meat, sausage, egg, vegetable, flowers, leaves, *etc.* In essence, the invention of Gangkofner is to use chocolate to bind any foodstuff imaginable, which can optionally be infused with alcohol. A copy of an English-language translation of Gangkofner is attached hereto for the Examiner's convenience in understanding the differences of this reference to the claimed invention. The chocolate mass of Gangkofner is simply used as a binder to fix the shape of the meat or vegetable part, or as flavorant or preservative.

Gangkofner fails to enable or even suggest: (a) at least 25 weight percent fat; (b) grinding vegetable solids to a size of about 80 microns or less; (c) including a fat comprising cocoa butter or derivatives thereof, vegetable fat, or combinations thereof; (d) providing a confectionery texture, particularly one having a melt-in-the-mouth sensation as recited in claims 9 and 39; (e) a continuous fat phase; and (f) a fat that provides a matrix for the vegetable solids. Applicants do, however, concede that Gangkofner teaches forming its completely unrelated product into a stable shape, *i.e.*, slabs for taking on a journey. With all due respect, the Office Action's motivation to modify Gangkofner involves blanket statements that equate to stating that one can optimize an aluminum or steel paperclip into the structure of a skyscraper by simply modifying every possible feature in obvious fashion, when in fact such a result would only be obvious if the present application were being used as a template for a hindsight rejection.

Moreover, Gangkofner is not directed to a confectionery product designed to increase vegetable consumption, as presently recited. Therefore, the cited reference does not even provide a motivation for various claimed features that are not taught by the reference. The vegetable solids of the present invention are dispersed in a continuous fat phase, however, no motivation or reasonable expectation of success existed to do so based on Gangkofner. Gangkofner also provided no motivation or expectation of success for one of ordinary skill in the art to replace some of the cocoa solids of the chocolate fat component therein, so as to provide a product as presently recited in claim 7 that will have the texture of chocolate but will include vegetable solids. Binding even vegetable chunks with a chocolate mass would not provide a confectionery product having the claimed amount of fat or the

claimed texture characteristics. The present invention is simply not even suggested by Gangkofner. Thus, Applicants respectfully request that the rejection of claims 1-14 under 35 U.S.C. § 103(a) be reconsidered and withdrawn since no *prima facie* case of obviousness has been shown on the record.

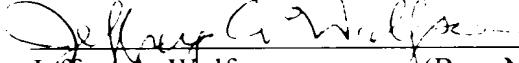
Applicant submits that the entire application is now in condition for allowance, early notice of which would be appreciated. Should the Examiner not agree, then a personal or telephonic interview is respectfully requested to discuss any remaining issues and expedite the eventual allowance of the application.

A CPA transmittal, with provision for the required fee, is submitted herewith to remove the finality of the Office Action and expedite the prosecution of this application. Applicants also submit herewith a Form PTO-1449 listing the two translated German references, which the Examiner suggested be submitted. Applicants respectfully request that the Form PTO-1449 be executed and returned to clearly evidence consideration of the English-language translation of these references.

No fee is believed to be due for this submission. Should any fees be due, however, please charge such fees to Winston & Strawn Deposit Account No. 501-814.

Respectfully submitted,

Date: 5/25/02



Jeffrey A. Wolfson (Reg. No. 42,234)
For: Allan A. Fanucci (Reg. No. 30,256)

WINSTON & STRAWN
Customer Number: 28765
(202) 371-5770

APPENDIX A: MARKED UP VERSION OF AMENDED CLAIMS

1. (Twice Amended) A confectionery product comprising:
a mixture of at least 25% by weight of solid fat which comprises cocoa butter
or a derivative thereof, vegetable fat, or a combination thereof, and
at least 15% by weight of non-cereal vegetable solids finely ground to a size of
about 80 microns or less that are dispersed in a continuous fat phase of the solid fat which
serves as a matrix for the vegetable solids to form a stable shape for the product and to impart
a confectionery texture to the product.

2. (Twice Amended) The confectionery product according to claim 1,
wherein the fat is present in an amount of at least about 30% by weight of the product [non-
cereal vegetable solids comprise finely ground particles having a size of about 80 microns or
less].

7. (Amended) The confectionery product according to claim 1, wherein
the product is formed from a chocolate or equivalent thereof where the vegetable solids have
replaced at least a portion of the cocoa solids, sugar solids, or milk solids, or a combination
thereof in the chocolate[fat is present in an amount of at least 25% by weight of the
confectionery product].

9. (Amended) The confectionery product [produce] according to claim 1,
wherein the fat imparts a melt-in-the-mouth sensation upon being placed in the mouth.

10. (Amended) The confectionery product according to claim 1, wherein
the fat comprises [is selected from the group consisting of] cocoa butter, cocoa butter
equivalent, cocoa butter replacer, crystallizable vegetable fat, and mixtures thereof.

13. (Amended) The confectionery product according to claim 1, further
comprising sugar in an amount of up to about 55% by weight of the product and wherein the
vegetable solids comprise a combination of vegetables.

34. (Amended) The confectionery product according to claim 32, further
comprising a second further shaped component comprising a non-cereal vegetable paste,

wherein the second further shaped component is positioned adjacent the shaped mixture in a second set configuration.

39. (Amended) A confectionery product comprising a mixture of solid fat in an amount of at least 25% by weight, which comprises cocoa butter or a derivative thereof, vegetable fat, or a combination thereof, and about 30% to about 60% by weight of non-cereal vegetable solids comprising finely ground particles having a size of about 80 microns or less, wherein the vegetable solids are dispersed in a continuous fat phase of the solid fat which serves as a matrix, at least one cereal-based component in an amount of up to about 40% by weight, and sugar in an amount of up to about 55% by weight, wherein the product has a stable shape and a confectionery texture to the product, with the fat imparting a melt-in-the-mouth sensation when the product is placed in the mouth.

40. (Amended) The confectionery product according to claim 39, wherein the non-cereal vegetable solids and fat are present in a ratio of between about 1:2 to about 3:1; the non-cereal vegetable solids comprises at least one type of vegetable preparation selected from the group consisting of dried vegetable pieces, dried vegetable powder, vegetable paste or vegetable distillate, vegetable concentrate and mixtures thereof; the fat comprises [is selected from the group consisting of] cocoa butter, cocoa butter equivalent, cocoa butter replacer, crystallizable vegetable fat, and mixtures thereof; the cereal-based component is selected from the group consisting of corn, oats, wheat, barley, rye, rice, millet malt and mixtures thereof; and the sugar is selected from the group consisting of glucose, lactose, fructose, sucrose, maltose, dextrose, polydextrose, maltodextrin [matodextrin], inverted sugar, a product of the enzymatic saccharification of starch and mixtures thereof.